Supreme Court, U.S.
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No. 01-1386

In The

# Supreme Court of the United States

ROBERT HANSEN AND MARLA DES ERMIA,

*Petitioners,*

v.

AEROSPACE DEFENSE RELATED INDUSTRY DISTRICT LODGE 725 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,

*Respondent.*

**On Petition For A Writ Of Certiorari To The California Court Of Appeal**

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Did the California Court of Appeal correctly rule that the facts of the Hansen case fell within this Court's decision in *Finnegan v. Leu*, which protects the right of an elected union president to fire an appointed business representative who disagrees with the union leadership?

2. Did the California Court of Appeal correctly rule that it was necessary for the jury to interpret the collective bargaining agreement in order to resolve Des Ermia's state law wrongful termination claim, thereby preempting it under section 301 of the LMRA, where the employer asserted as a defense that it had laid her off in accordance with the collective bargaining agreement?

## LIST OF PARTIES

The petition accurately lists the parties to the proceeding.

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## STATEMENT OF THE CASE

The respondent, District Lodge 725, respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the California Court of Appeal's decision in this case. The petition states no grounds that require or justify review by this Court. Petitioners' statements of the issues misstate the factual circumstances of their claims.[1] By this error, petitioners demonstrate that their dispute with the Court of Appeal's decision is largely based on factual arguments.

Review of the Court of Appeal's Opinion is also unnecessary either to secure uniformity of decision or to settle any important question of law. Plaintiffs' sweeping assertion, that the decision of the Court of Appeal "forecloses the possibility of an employee who is employed by a labor union from ever prosecuting an action against his or her employer on the basis that the termination was in violation of the public policy of the state of California" (Pet. at 11), is a vast overstatement of the effect and the nature of the Court of Appeal Decision. In finding the petitioners' claims preempted under two different branches of federal labor law, the Court of Appeal applied well-established decisions of this Court and the California Supreme Court. The Court of Appeal simply

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[1] The decision of the California Court of Appeal contains a succinct and accurate rendition of the facts of the two consolidated cases. (*See* App. at 2-4.) Respondent incorporates the Statement of Facts contained therein.

observed that petitioners' claims, as tried to the jury, factually came within these preemption doctrines.

## REASONS FOR DENYING THE WRIT

### A. Petitioners Seek Review Of Factual Conclusions

#### 1. With Respect to Petitioner Hansen, Neither the Decision Below Nor the Record Raises the Question Presented in the Petition

In their question presented with respect to petitioner Hansen, petitioners ask the Court to consider a factually incorrect question. They ask the Court to resolve whether a claim of wrongful discharge in violation of public policy by "an elected union official who is discharged by the union for exposing union corruption to the union membership" is preempted by federal law governing union democracy. As the Court of Appeal observed, however, Hansen was not discharged for exposing union corruption: "Hansen did not establish at trial that he had reported criminal behavior or that he refused to aid and abet any criminal acts." (App. at 11.) "All Hansen was able to prove at trial was that he was discharged because of his remarks criticizing [the union president's] performance." (App. at 11.) Hansen's dispute is not with the law, but with the Court of Appeal's factual conclusions concerning the nature of his discharge from employment.

Petitioner Hansen also appears to dispute the Court of Appeal's factual conclusion regarding the basis upon which his claim was preempted by the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C.

§ 401, *et seq.* ("LMRDA"), namely, that he was an appointed and not an elected business agent. Petitioners assert that Mr. Hansen was not an appointed union official but was elected. (Pet. at 3, 14.) The Court of Appeal rejected this argument because petitioners' assertion was factually wrong. While Hansen had been an elected business agent with his prior employer, District 720, that District had ceased to exist when it was merged, along with a number of other Districts, into District 725. District 725 was governed by a new set of by-laws which provided that business agents, like Hansen, were appointed. (App. at 7.)

### 2. Like Petitioner Hansen, Petitioner Des Ermia Seeks Review of the California Court of Appeal's Factual Conclusions

Like petitioner Hansen, petitioner Des Ermia seeks this Court's review of the appellate decision entirely on a factual basis. Petitioners do not challenge the well-established decisions of this Court and other federal courts that a person employed pursuant to a collective bargaining agreement may not pursue a state law claim for wrongful discharge in violation of public policy, or any other state law theory, if resolution of that claim is substantially dependent on the interpretation of a collective bargaining agreement. *E.g., Lingle v. Norge Div. of Magic Chef*, 486 U.S. 399 (1988); *Wooddell v. International Bhd. of Elec. Workers, Local 71*, 502 U.S. 93, 101-02 (1991); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985); *Aguilera v. Pirelli Armstrong Tire Corp.*, 223 F.3d 1010, 1014 (9th Cir. 2000). Rather, petitioner Des Ermia's actual issue is with the Court of Appeal's conclusion that it was necessary to

interpret the collective bargaining agreement governing her employment in order to resolve her claim in this case.

As with the issues raised with respect to petitioner Hansen's claim, this is purely a factual inquiry. Resolution of these factual conclusions will not affect anyone other than the present litigants, and provides no basis or justification for review by this Court.

### B. The Court of Appeal Correctly Applied Well-Established Federal And State Law in Determining that Hansen's Claim Was Preempted

As noted above, petitioners' question presented with respect to Mr. Hansen's claim is wrong. The correct question is: Does federal law protect the right of an elected union president to fire an appointed business representative who criticizes his boss to the union membership? The California Court of Appeal correctly held that Hansen's claim that he was wrongfully terminated in violation of public policy for comments made to union members critical of his elected boss was preempted under the LMRDA. In doing so, the court applied well-established law stemming from this Court's ruling in *Finnegan v. Leu*, 456 U.S. 431 (1982) and by the California Supreme Court's decision in *Screen Extras Guild, Inc. v. Superior Court*, 51 Cal. 3d 1017, 275 Cal. Rptr. 395, 800 P.2d 873 (1990).

In *Finnegan v. Leu*, the petitioners were appointed business agents who had campaigned for the incumbent president in a union election. After the new president won the election, he promptly fired the business agents, explaining that their continued employment would undermine his ability to implement the chosen programs

and procedures of his new administration. *Id.* at 433. The business agents brought suit under the LMRDA, alleging wrongful termination. *Id.* at 434.

This Court held that the business agents failed to state a claim under the LMRDA. In doing so, this Court acknowledged that the LMRDA protects the freedom of elected union officials "to choose a staff whose views are compatible with their own" and that hiring and firing union staff members is an "integral part of ensuring a union administration's responsiveness to the mandate of the union election." *Finnegan v. Leu*, 456 U.S. 431, 440-41. The holding was based on the notion that the newly elected president's victory might be rendered meaningless if disloyal staff were able to thwart the implementation of his programs. This Court noted that in enacting the LMRDA, Congress "simply was not concerned with perpetuating appointed union employees in office at the expense of an elected president's freedom to choose his own staff. Rather, its concerns were with promoting union democracy, and protecting the rights of union members from arbitrary action by the union or its officers." *Id.* at 442.

In *Screen Extras Guild, Inc. v. Superior Court*, 51 Cal. 3d 1017, 1021 (1990), the California Supreme Court held that the *Finnegan* ruling and the federal policy favoring union democracy underlying *Finnegan* preempts state law claims for "wrongful discharge or related torts" brought by discharged management or policy-making union employees against their union employer. The California Supreme Court reasoned that to allow such claims "would inhibit the ability of elected union officials to freely choose their staffs and would thus impermissibly

frustrate full realization of the goals of the LMRDA [citation]." *Id.* at 1028.

Other state and federal courts have followed the California Supreme Court's ruling in *Screen Extras Guild*, uniformly holding that *Finnegan* preempts state law wrongful discharge suits brought by appointed union employees. *Dzwonar v. Robert McDevitt & Local*, 791 A.2d 1020 (N.J. 2002) (*Finnegan* requires preemption with respect to discharge of union employees with policy-making responsibilities); *Montoya v. Local Union III of I.B.E.W.*, 755 P.2d 1221 (Colo. App. 1988) (*Finnegan* requires preemption of business agent's wrongful termination claims, except to the extent the *Bloom* exception applies); *Casumpang v. ILWU, Local 142*, 94 Haw. 330, 342 (Haw. 2000) (acknowledging *Finnegan* preemption, but finding doctrine inapplicable to an elected business agent asserting a pure assumpsit claim); *Young v. International Bhd. of Locomotive Eng'rs*, 114 Ohio App. 3d 499 (Ohio App. 1996) (acknowledging *Finnegan* preemption in *dicta*); *Agen v. Teamsters Joint Council No. 2*, 617 F. Supp. 81, 82-83 (D. Mont. 1985) (same).

To avoid the holdings of *Finnegan* and *Screen Extras Guild*, petitioners rely on the Ninth Circuit's decision in *Bloom v. General Truck Drivers, etc., Local 952*, 783 F.2d 1356 (9th Cir. 1986). In *Bloom*, a business agent sued his former union employer, alleging that he had been fired for refusing to falsify minutes of an executive board meeting which authorized the expenditure of funds. *Id.* at 1358. The Ninth Circuit recognized an exception to the preemption principles in *Finnegan* and *Screen Extras Guild* in the *Bloom* case because the business agent had been discharged for refusal to commit a crime. *Id.* at 1362.

Petitioners attempt to bring Hansen's case within the *Bloom* holding by factually misrepresenting the conduct that led to his termination. They argue that he was discharged for "exposing" a criminal violation. As the Court of Appeal noted, however, the plaintiff in *Bloom*, who was allowed to proceed with his cause of action for wrongful discharge in violation of public policy, had alleged that he was terminated for refusing to commit a crime which would have led to the cover-up of embezzlement by another union official. In contrast, Hansen "did not establish at trial that he had reported criminal behavior or that he refused to aid and abet any criminal acts." (App. at 11.) As the Court of Appeal further noted, "[a]ll Hansen was able to prove at trial was that he was discharged because of his remarks criticizing [the union president's] performance." Under *Screen Extras Guild*, "[i]t was therefore clearly within the president's rights to discharge him for voicing his contrary views." (App. at 11.)

Hansen also tries to suggest that the *Bloom* case stands for the proposition that claims of wrongful discharge in violation of public policy in general are not preempted by the LMRDA. *Bloom* is not so broad. It deals with a narrow situation of an employee who claimed he was fired for refusing to commit an actual crime, whereas Hansen was fired not for refusing to commit a crime but for griping about his boss to fellow union members. The policy of the LMRDA which this Court recognized in *Finnegan v. Leu* is that the interest of an elected union official in having loyal appointed subordinates requires preemption of state law claims. Only, as in *Bloom*, where that policy would otherwise lead to sanctioning criminal conduct has a court recognized an exception.

### C. The Court of Appeal Correctly Applied Well-Established Federal Law in Determining that Des Ermia's Claim Was Preempted

As with Hansen, petitioner Des Ermia's quarrel with the Court of Appeal's conclusion is largely factual. She does not dispute the settled law that a state law claim, including one for wrongful discharge in violation of public policy, is preempted if its resolution requires interpretation of a collective bargaining agreement.

The law governing section 301 preemption is well-established, and applies to tort and contract claims alike as long as the claim "is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220, 105 S. Ct. 1904, 85 L. Ed. 2d 206 (1985); *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 402, 403, 108 S. Ct. 1877, 100 L. Ed. 2d 410 (1988). Numerous other decisions, from federal and state courts throughout the land, establish this point. *See, e.g., Aguilera v. Pirelli Armstrong Tire Corp.*, 223 F.3d 1010 (9th Cir. 2000) (fraud claim preempted because it required interpretation of CBA); *Moreau v. San Diego Transit Corp.*, 210 Cal. App. 3d 614, 258 Cal. Rptr. 647 (1989) (public policy discharge and emotional distress claims preempted); *Friday v. Hughes Aircraft Co.*, 188 Cal. App. 3d 117, 236 Cal. Rptr. 291 (1986) (public policy discharge and emotional distress claims preempted); *Doran v. Thermatex Corp.*, 1989 U.S. Dist. LEXIS 16312 (N.D. Ohio 1989) (claim for retaliatory termination preempted); *Baker v. Farmers Elec. Coop.*, 34 F.3d 274, 280 (5th Cir. 1994) (emotional distress claim preempted); *Terwilliger v. Greyhound Lines, Inc.*, 882 F.2d 1033, 1037 (6th Cir. 1989) (fraud and misrepresentation claim

preempted); *Lydon v. Boston Sand & Gravel Co.*, 15 F. Supp. 2d 150 (D.Mass. 1998) (claim for violation of a workers' compensation statute preempted).

Significantly, it does not matter whether the issue of interpreting a collective bargaining agreement is raised by the plaintiff in her claim, or by the employer as a defense. As the Court in *Lingle* recognized, construction of a bargaining agreement may be just as much at issue in the refutation of a claim as in its prosecution. *Lingle*, 486 U.S. at 407.

Here, petitioner Des Ermia's claim presents a classic case of section 301 preemption. The Court of Appeal found for several reasons that the jury was required to interpret the collective bargaining agreement in order to resolve her claim. First, the court found that interpretation of the collective bargaining agreement was necessary to resolution of Des Ermia's claim because, "[i]n order to find there was a pretext for laying her off the jury necessarily had to find that she was laid off out of seniority order, or that appellant violated the provisions of the CBA." (App. at 10.)

Petitioners argue that the Court of Appeal misapplied the preemption doctrine because the issue of interpretation of the collective bargaining agreement was raised by the employer as a defense and the employer's interpretation was found to be false by a jury. (Pet. at 12.) The Court of Appeal rejected this very argument, however, citing *Moreau v. San Diego Transit Corp.*, 210 Cal. App. 3d 614, 621 (1989), for the proposition that where the employer's defense necessarily requires the jury to interpret the collective bargaining agreement, preemption

still applies no matter how strong the public policy involved. (App. 11-12.)

This was precisely the issue in the Des Ermia case below. Des Ermia's state law claim involved allegations that the employer's actions were motivated by an intent to retaliate against her for reporting criminal activity. The resolution of that issue turned on the legitimacy of the employer's non-discriminatory reason for terminating Ms. Des Ermia, namely, a layoff in order of seniority in conformance with the collective bargaining agreement. The fact that the jury may have found that the employer did not conform with the collective bargaining agreement does not avoid preemption. To the contrary, it demonstrates the need for preemption. Uniformity of interpretation of collective bargaining agreements requires that such issues be decided not by juries, but through the grievance and arbitration process under federal law. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985).

The necessity for the jury to interpret the collective bargaining agreement arose not only because the employer asserted as a defense that it had laid Des Ermia off in accordance with the agreement, but also because petitioners argued to the jury that respondent's violation of the agreement in various ways was evidence of respondent's retaliatory motive. As the Court of Appeal noted, one of the most hotly debated issues at trial was Des Ermia's proper seniority date under the collective bargaining agreement. "One of Des Ermia's main allegations was that [respondent] violated the CBA by laying her off before other, less senior, employees . . . . Des Ermia also argued that the District violated the CBA by denying her a position in another area office, by failing to recall her

after her layoff when another clerical employee quit and that she was wrongfully denied vacation and sick leave pay." (App. at 9-10.) Thus, even under Des Ermia's theory of the case, the jury had to interpret the collective bargaining agreement in reaching its verdict.

## CONCLUSION

The Petition for Writ should be denied because there are no issues meriting the Court's attention.

Respectfully submitted,

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